

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK T. McPHERSON and U.S. POSTAL SERVICE,
POST OFFICE, Irvington, N.J.

*Docket No. 96-1491; Submitted on the Record;
Issued October 5, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its January 11, 1996 decision, to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On June 3, 1993 appellant, then a 32-year-old letter carrier, sustained a chest wall sprain in the performance of duty.

Appellant subsequently filed claims for compensation benefits alleging recurrences of disability on July 5 and 15, 1993.

By decision dated January 27, 1994, the Office denied appellant's recurrence claim on the grounds that the evidence of record failed to establish that he had sustained a recurrence of disability causally related to his June 3, 1993 employment injury.

By letter dated February 17, 1994, appellant requested an oral hearing before an Office hearing representative.

On July 20, 1994 a hearing was held before an Office hearing representative at which time appellant testified.

By decision dated September 27, 1994, the Office hearing representative affirmed the Office's January 27, 1994 decision on the grounds that the evidence of record failed to establish that appellant had sustained recurrences of disability on July 5 and 15, 1993 causally related to his June 3, 1993 employment injury.

By letter dated September 27, 1995, submitted through his representative, appellant requested reconsideration of the denial of his claim and submitted new evidence.

In a report dated September 27, 1995, Dr. Henry M. Sherman, a Board-certified family practitioner, stated that he had made an error in a previous report in which he had stated that appellant had a condition regarding his right upper arm and pectoral area. He indicated that he examined appellant regarding his left upper arm and pectoral area.

By decision dated January 11, 1996, the Office denied appellant's request for further merit review of his claim.

The Board finds that the refusal of the Office, in its January 11, 1996 decision, to reopen appellant's case for further consideration of the merits of his claim did not constitute an abuse of discretion.

The only decision before the Board on this appeal is the Office's January 11, 1996 decision denying appellant's request for a further review on the merits of his claim. Because more than one year has elapsed between the issuance of the Office's September 27, 1994 merit decision and April 15, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the Office's September 27, 1994 decision and prior decisions.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵

In requesting reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law and he did not advance a point of law or a fact not previously considered by the Office. He submitted a report dated September 27, 1995, in which Dr. Sherman, a Board-certified family practitioner, stated that he had made an error in a previous report in that he had stated that appellant had a condition regarding his right upper arm and pectoral area but he meant to say that the problem was in the left upper arm and pectoral area. He did not opine as to the cause of appellant's condition. This medical report does not constitute relevant and pertinent evidence not previously considered by the Office as it does not address the

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Joseph W. Baxter* 36 ECAB 228, 231 (1984).

relevant issue in this case, whether appellant's claimed recurrence of disability in July 1993 was causally related to his June 3, 1993 employment injury.

Appellant has not established that the Office abused its discretion in its January 11, 1996 decision by denying his request for a review on the merits of his claim under section 8128(a) of the Act because he has failed to show that the Office erroneously applied or interpreted a point of law, he has not advanced a point of law or a fact not previously considered by the Office, and he has not submitted relevant and pertinent evidence not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated January 11, 1996 is affirmed.

Dated, Washington, D.C.
October 5, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member